In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 4[illegible]

LOY MASSEY,

Petitioner,

vs.

KOSTER & WYTHE, a Co-partnership,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner Lon Massey prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on May 17, 1961.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is not yet reported, and is set forth in the Appendix. There was no opinion filed by the District Court of Guam.

JURISDICTION

The judgment of the Court of Appeals was entered May 17, 1961. A petition for rehearing was filed on July 17, 1961 and denied on August 4, 1961. The District Court had jurisdiction under 48 U.S.C. §1424, the Court of Appeals under 48 U.S.C. §§1291 and 1294 and the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

This case presents the question of the extent of the application of the doctrine of ultrahazardous activities in an operation wherein petitioner was engaged in disposing of surplus war material in the territory of Guam. Specifically, the question presented is whether the District Court of Guam committed error in refusing to give certain instructions on the law of ultrahazardous activities, as requested by appellants. The Court of Appeals held that this case presents the question whether the demilitarization of incendiary bombs in the manner adopted by petitioner, Lon Massey, constitutes an ultrahazardous activity so as to impose liability for foreseeable harm irrespective of the exercise of due care.

Petitioner urges that the wording of the question by the Court of Appeals, in such manner, namely use of the word "bomb", is error, in that this assumes that the activity in question involved the handling of incendiary bombs, with all the connotations of danger generally attached and associated to the word

"bomb". Under this assumption, the Court of Appeals has reversed the ruling of the District Court of Guam (which had refused to instruct the jury on the doctrine of ultrahazardous activities) and ordered the case remanded for a new trial.

Petitioner urges that use of the word "bomb" in the manner and usage of the Court of Appeals, irresistably drew the Court into error, in that the connotation of ultrahazardousness is strongly associated with the word "bomb", and so strongly that the essential feature of a necessary risk of serious harm is dwarfed by the compelling force of the word. Petitioner urges that the correct analysis should proceed from phraseology that more accurately interprets the facts in the case and it is respectfully suggested that the following question more closely fits the test of facts. " . . . Whether the emptying of the incendiary contents of casings, which in fact were bomb casings, but from which the booster charges and detonators had been withdrawn prior to the operation, constituted an ultrahazardous activity."

STATEMENT OF THE CASE

Petitioner Lon Massey operated a yard approximately a city block in area on the outskirts of Tamuning, Guam, where he conducted a scrap and salvage business.

In 1956, Massey purchased from the United States 7514 casings for incendiary bombs. Prior to the sale

to Massey, the United States had disarmed the bombs by removing the fuse devices which cause the bombs to burst into flames. What Massey purchased was the *casings* and their *contents*. These contents, according to experts, were not easy to ignite, or as one testified, "It takes a pretty hot temperature to get it started." (R.T. 701.)

Massey intended to empty the contents and sell the casings. An Air Force Sergeant assigned by the Air Force to Massey had developed a method for emptying the contents. Two plugs were removed from the casings. An air hose was connected to one hole, and the contents were blown out of the other and burned on the ground.

On May 9, 1956 Massey was in the States and his workmen were conducting the operation. A fire of unknown origin started in an unknown place and reached the contents which had been discharged. The fire also spread to the stockpile of unemptied casings. At this point the Court of Appeals assumes there was an explosion. The expert testimony, however, was to the effect that the casings cracked, and, by reason of the force of escaping pressure, flew into the air. The contents of the casings were not an explosive mixture, even when used in wartime. Their function was incendiary only. There was no disintegration, nor was there any blast effect. The resulting damage was caused by the force of the casings when they landed, not by any explosive force. As testified to by the Air Force Sergeant, there were no explosive components. (R.T. 698.)

REASONS FOR GRANTING THE WRIT

Webster defines "bomb" as follows: 1. *Mil.* A projectile containing a high explosive charge, propelled at low velocities by a mortar or other thrower. 2. Any similar missile or device; as a dynamite bomb. Webster's Collegiate Dictionary, Fifth Edition. In its ordinary meaning, therefore, the word bomb suggests destructive explosives. Its use in the present case makes it almost impossible to appreciate the nature of the accident which occurred.

The law relating to the doctrine of ultrahazardous activities is almost entirely based on the Restatement of the Law of Torts. It is significant that in its opinion the Court of Appeals cited no authority other than the Restatement. Appellee has found no other reported cases arising from the island of Guam which invoke the doctrine, nor has appellee found any cases of ultrahazardous activities wherein jet propelled vehicles (and in the setting of this accident, in effect the casings literally "jetted" into the air when the fire caused the internal contents to expand), were involved. Unless corrected, the decision of the Court below could well become a landmark case for the proposition that any demilitarization of surplus war material is an ultrahazardous activity.

The basic reason for reinstating the ruling of the trial Court, however, is that the activity in question could not have necessarily involve a risk of serious harm to the person, land, or chattels of another. The doctrine is not applicable to activities which can be safely carried out if reasonable care is used. *Beck v.*

Bel Air Properties, Inc., 134 C.A. 2d 834, 286 P. 2d 503. The only risk involved was the ordinary risk of fire resulting from the use of any kind of inflammable materials, including wooden structures. The injuries arose partly from the ordinary effects of the fire, and partly from the force of the casings when they landed. As to the fire, there is no evidence that it was in any way connected with the activity, nor was there necessarily a serious risk of harm from fire. As to the casings their reaction was so unexpected that the risk of its occurrence was not only not a necessary risk, but was not even reasonably foreseeable.

The distinction between foreseeability of result for purposes of proximate cause must be distinguished from foreseeability of risk for purposes of establishing whether a risk of serious harm has necessarily been created. For purposes of proximate causation, it is permissible to apply the test looking backward after the event, as to whether the consequences were "highly extraordinary". Restatement of Torts, 1948 Supp. Sec. 435(2). But to determine whether a risk of serious harm was necessarily created by the activity, the decisive point is the risk, not the injury, and to measure the risk one must look forward, particularly when the test refers to a necessary risk.

The limits of the risk limit liability. As stated in Prosser, Torts, page 338, ". . . where there is neither intentional harm, nor negligence, the line is generally drawn at the limits of the risk, or even within it." See Pollock, Duties of Insuring Safety: The Rule in *Rylands v. Fletcher*, 1886, 2 L.Q. Rev. 52.

Thus, where a fire set on defendants' premises causes cattle to stampede, the damages were held not to include subsequent loss of weight of cattle because of fright and the lack of feed which was burned in the fire. *Chicago B. & Q. R. Co. v. Gelvin*, 8 Cir. 1916, 238 F. 14.

And where the defendant's blasting hurls a rock to such a distance that no experience would have recognized the danger, the plaintiff cannot recover without a finding of negligence. *Klepsch v. Donald*, 1892, 4 Wash. 436, 30 P. 991, 31 Am. St. Rep. 936.

Looking forward from the time of the operation, can it be said as a matter of law that the District Court was wrong in not concluding that a risk of serious harm was necessarily created by the operation of Mr. Massey? The Air Force had assigned a sergeant for the specific purpose of devising the procedure used. The Sergeant had experience in other demilitarization programs and in his deposition stated that he did not feel it was necessary to be extremely careful in the undertaking providing there was adequate ventilation, which requirement was met by the open-air operation. (R.T. 703.) Another air-force expert, Major Bell, testified that the casings would not be explosive even if the contents were leaking (R.T. 661) and that there was no hazard or danger in storing or transporting the casings. (R.T. 620, 621.) Further, Major Bell testified he had seen Massey's premises (R.T. 629) and stated they were suitable for limited operation. (R.T. 653.) He further testified he had no doubt of Massey's ability to handle the casings in question. (R.T. 653.)

The foregoing summary is not given by way of argument on the weight of the evidence. It is given solely to demonstrate the error that arose from the use of the word "bomb" and the assumption that the bombs "exploded". The Court of Appeals felt that "the very nature of the material involved created an extreme hazard in the event of fire", and, further, that "the hazard was apparent and the resulting injury clearly foreseeable". Had the casings actually exploded there could be no real injustice in applying the doctrine of strict liability. Petitioner is particularly aggrieved however by its application to this activity (which does not necessarily involve a risk of serious harm and was concurred in by the Air Force) solely because of the connotation of the word "bomb" and the unforeseeable reaction that actually occurred.

Blasting operations are frequently held to be ultrahazardous. Yet, who would suggest that, if an air compressor used in conducting such operations were to crack and, by reason of the escaping air, project itself into adjoining property, this should result in absolute liability? The distinction is that liability is limited to the particular risk of damage from the explosive materials.

An appraisal of the Restatement doctrine of ultrahazardous activities appears in James, "Absolute Liability for Ultrahazardous Activities", 37 Cal. L. Rev. 269. The author and other writers (page 272) concur in the requirement of an objective test of foresee-

ability on the ground "the actor is liable only to those persons, whose person or property he 'should recognize as likely to be harmed'" Rest. Torts, Sec. 519.

Further reasons for the requirement of foreseeability of the risk as a prerequisite to liability are stated as follows: "The policy grounds for imposing absolute liability are basically that activities should bear losses which can reasonably be anticipated as a consequence of their being carried on." "Since foreseeability of the risk as an inherent part of carrying on the activity is essential to the establishment of proper reserves or insurance to cover losses without disrupting the continued operation of the activity, it must be present before absolute liability can reasonably be imposed, and therefore, is a necessary element in any adequate absolute liability doctrine." James, "Absolute Liability for Ultrahazardous Activities", 37 Cal. L. Rev. 269, 275.

The author also points out (page 272) the significance of the concept of "activity". "One is absolutely liable because of the nature of his *activity;* one is liable for negligence, not for the nature of his *act,* but for the manner in which he has performed it." Appellee also urges that the Court of Appeals applied an incorrect standard in taking into consideration the *manner* in which Massey conducted his operations. The manner in which the activity is performed may be a basis for negligence, but for the Court to apply it as a part of the test of ultrahazardous activities is to take over the function of the jury, which specifically found Massey not negligent.

In effect, to hold that Massey was engaged in an ultrahazardous activity is to hold that any demilitarization by blowing out the contents of this type of bomb is ultrahazardous. The issue is thereby clouded by inserting the manner in which the activity is conducted into the question of what is ultrahazardous, and avoiding the activity itself. The activity is the emptying of the bombs by the use of air pressure. Everything else, including the disposal of the contents, is part of the procedure and precautions taken in accomplishing the main activity. For instance, the contents of these bombs could have been carried away on a conveyor belt. The jury expressly found, however, that Massey was not negligent in this regard. His activities did not involve a breach of duty and were not unreasonable. The only explanation for the spread of the fire is that it was purely a freak accident.

The "storage" of the material in question, if leaving the material on the ground can be termed storage, and if said storage could be treated as an activity in itself, is not an ultrahazardous activity. One would not consider the storage of wood or hay as an ultrahazardous activity. Yet, these materials would ignite more readily than the bomb contents (which were not ordinarily too easy to ignite) and, though perhaps not as spectacular as the incendiary mix, could cause a fire of great magnitude.

There is the further question as to the analogy of the within case to the privilege given acts sanctioned by statutory authority. Thus, a contractor, do-

ing work involving blasting for the State, has been held not subject to strict liability. See Prosser, Torts (1945), 344 (citing cases).

Massey was performing a service in disposing of surplus government war material. The jury expressly found he was not negligent in his operations. Should everyone who conducts demilitarization of surplus incendiary bombs be an insurer for all damage caused thereby? If so, will this not be a decided hindrance to the Federal Government in future demilitarization programs? If such a rigid standard appears to be the law, it should be difficult to find private contractors willing to take such risks. For the military services to conduct such operations themselves is to reduce manpower needed for more vital functions.

Finally, it must be remembered that the Island of Guam is in a sense a military area. Civilian contractors performing demilitarization programs for the military authorities may well be engaged in what could be considered a normal operation for this area.

CONCLUSION

The opinion of the Court of Appeals, if allowed to stand, will as a precedent put a great burden on future demilitarization programs, particularly on the Island of Gaum. At best, it will be a misleading guide as to the scope of the doctrine of ultrahazard-

ous activities. We therefore respectfully submit that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
September 7, 1961.

ROY C. HALL,
Attorney for Petitioner.

ALVIN G. BUCHIGNANI,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals for the Ninth Circuit

Koster & Wythe, etc., Appellant, vs. Lon Massey, et al., Appellee. and Lon Massey, et al., Appellant, vs. Koster & Wythe, etc., Appellee.	No. 16,887 May 17, 1961

Upon Appeal from the United States District Court for the District of Guam

Before: POPE, HAMLIN and MERRILL, Circuit Judges

MERRILL, Circuit Judge

This case presents the question whether the demilitarization of incendiary bombs in the manner adopted by the appellee constitutes an ultrahazardous activity so as to impose liability for foreseeable harm irrespective of the exercise of due care. The district court held that it did not. We are compelled to disagree.

Appellee Massey was engaged in the scrap and salvage business in Tamuning, Guam. He operated a junk yard approximately a city block in area on the outskirts of Tamuning. Appellant, engaged in the construction business, occupied adjoining premises.

In 1956, Massey purchased from the United States 7,514 M-76 incendiary bombs with the intention of selling the casings after unloading their incendiary contents. On May 9, 1956, in the course of demilitarizing the bombs at his junk yard, the discharged contents of bombs caught fire. The fire spread to a stockpile of loaded bombs which exploded. The explosion and spread of fire caused property damage to appellants. In this action for damages brought by appellants, the jury returned a verdict for appellees and this appeal was taken.[1]

The M-76 bomb weighs 500 pounds. It is filled with PT-1, an incendiary mixture consisting of rubber, crude oil, thermite powder, magnesium dust and a small amount of gasoline. The bombs sold to Massey were fully loaded but were not fused and could, without undue risk, be stored loaded. The contents, while designed for incendiary purposes, were not subject to spontaneous combustion and in fact were not ordinarily too easy to ignite. As an expert testified, "It takes a pretty hot temperature to get it started." Once started, however, the fire created intense heat and would be difficult to extinguish. It was in this fact that the functional value of the bomb lay.

[1]This case arising in Guam, district court jurisdiction is conferred by 48 U.S.C. § 1424. The appellate jurisdiction of this court is conferred by 28 U.S.C. §§ 1291 and 1294.

The bombs were emptied by a method developed by an air force sergeant who had been assigned to Massey for that purpose. The bombs contained two plugs. These were removed. An air hose was connected to one hole and the contents were blown out of the other and then were burned on the ground.

A month before the fire occurred, Massey left for the states on business leaving his secretary in charge of the yard. No fire fighting equipment had been provided except for a bulldozer which could have been used to build a fire lane. No efforts apparently had been made to isolate the stockpile of loaded bombs (also located in the yard) from incendiary material discharged during the course of the operation.

On May 9, 1956, the operation was proceeding apace in the hands of three workmen. A substantial amount of incendiary matter was already accumulated on the ground in the yard, since there had been no burnings during Massey's absence. No one knows how the fire started. There is dispute in the testimony as to precisely where in the yard it started. These questions are not important. We may assume (although it is denied by Air Force witnesses) that it was contemplated that the incendiary matter was to be burned at the yard. Liability is not created by the fact that a fire started or by the fact that it started where it did. If liability results it is from the fact that this fire, once started, was, under the conditions created by appellee or his employees, destined to burn out of control and in its course to reach the stockpile of bombs.

Appellants requested an instruction on the liability of one engaged in an ultrahazardous activity to the effect that "the law, regardless of the amount of care he uses, holds him liable to every person who is injured as a proximate result of that activity, provided that the operator knew, or in the exercise of ordinary care ought to have known the hazard involved and the probability of such a result if that hazard were to materialize." That this is an accurate statement of the law is not seriously disputed. See, e.g., Restatement of the Law of Torts, § 519. The following instruction also was requested:

> "Storing and emptying incendiary bombs, though disarmed, and leaving the contents of such bombs exposed, constitutes an ultrahazardous activity within the meaning of the term as I have used it in my instructions."

These instructions the district court refused upon the ground that it had not been sufficiently established that the operation was ultrahazardous. In this we are convinced the court fell into error.

Irrespective of the degree of risk involved in the Air Force procedures, the very nature of the material involved created an extreme hazard in the event of fire. As the facts themselves abundantly demonstrate, the operation as carried out amounted to an ultrahazardous open storage of a mass of incendiary matter. The hazard was apparent and the resulting injury clearly foreseeable.

It might well be argued that the failure of Massey regularly to dispose of the incendiary matter, to pre-

vent its accumulation, to isolate the stockpile and to take precautions against the spread of fire constituted a clear breach of duty owing to the public. The jury quite apparently took a different view and it is not necessary that we either approve or dispute their determination as to the appropriate standard of care.

The Restatement of the Law of Torts, § 520, defines an ultrahazardous activity as follows:

> "An activity is ultrahazardous if it
>
> (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and
>
> (b) is not a matter of common usage."

If one accepts Massey's contentions that he did everything he could have been expected to do and that the damage resulted notwithstanding his exercise of due care and respect for approved procedures, one is irresistibly drawn to the conclusion that injury was due to the ultrahazardous nature of the operation. The more persuasively Massey presents his case of an exercise of due care, the stronger grows the case for ultrahazardousness.

We conclude that it was error not to have given the instructions requested on ultrahazardous activity.

Reversed and remanded for new trial.

(Endorsed) Opinion Filed May 17, 1961.

Frank H. Schmid, Clerk.

United States Court of Appeals for the Ninth Circuit

Koster & Wythe, etc., vs. Lon Massey, et al. ——— Lon Massey, et al., vs. Koster & Wythe, etc.	No. 16,887

JUDGMENT

Appeal from the United States District Court for the District of Guam.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Guam and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in favor of appellant Koster & Wythe, a copartnership, and Hawaiian Dredging Co., Ltd., and against appellee Lon Massey, d/b/a Massey Equipment Co., and that this cause be, and hereby is remanded to the said District Court for a new trial.

It is further ordered and adjudged by this Court that Koster & Wythe, and Hawaiian Dredging Co., Ltd., recover against Lon Massey, d/b/a Massey Equipment Co. for their costs herein expended, and have execution therefor.

Filed and entered May 17, 1961.